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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SIMON BENJAMIN, Plaintiff and Appellant, v. NASSER RAFIE et al., Defendants and Respondents.	B194593 (Los Angeles County Super. Ct. No. SC080932)

APPEAL from a judgment of the Superior Court of Los Angeles County, John L. Segal, Joe. W. Hilberman and Lorna Parnell, Judges. Affirmed in part; reversed in part.

Richard D. Rome for Plaintiff and Appellant.

Leslie Walker VanAntwerp; John L. Dodd & Associates, John L. Dodd and Gerard D. McCusker for Defendants and Respondents.

INTRODUCTION

Plaintiff Simon Benjamin sued Flora Rafie, Nasser Rafie, and Stella Rafie alleging defendants fraudulently appropriated cash and real property in Santa Monica and Iran, which assets Benjamin claimed belonged to him. The court sustained without leave to amend defendants' demurrers to numerous of Benjamin's causes of action in his first through third amended complaints, dismissed one cause of action on the basis of inconvenient forum, and granted summary adjudication of still other causes of action. Benjamin appeals from the judgment entered upon these rulings. We affirm the judgment in part and reverse it in part.[1]

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[1] Respondents contend that the judgment is not appealable because Benjamin stipulated to it. Generally, a stipulated judgment is not appealable. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 400.) However, an exception to this rule allows an appeal " '[i]f consent was merely given to facilitate an appeal following adverse determination of a critical issue. . . .' [Citation.]" (*Id*. at p. 400.) At issue in *Norgart* was the accrual of the plaintiffs' causes of action under the discovery rule. (*Id*. at p. 402.) The plaintiffs consented to entry of summary judgment on the issue. The Supreme Court observed that it would be a waste of trial court time to require the plaintiffs to undertake a likely unsuccessful trial simply to obtain an appealable judgment. (*Ibid.*) A similar result obtains here. Reviewing the record, Benjamin's attorney explained that the stipulation was for the entry of judgment to allow Benjamin to appeal. Thus, because Benjamin's consent here was given to facilitate an immediate appeal following adverse determinations of various causes of action in the assorted iterations of his complaint, the stipulated judgment is appealable. Nasser counters that he relied on the stipulated judgment to his detriment by dismissing his cross-complaint. But the stipulation was the result of an agreement reached by *both* parties under which Nasser would dismiss his cross-complaint without prejudice conditionally upon the result of the appeal. His attorney agreed that his cross-complaint would be resurrected if Benjamin was successful on appeal. Given he would suffer no detriment, Nasser may not be heard to complain that the result is unfair to him. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501, citing *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166.)

FACTUAL AND PROCEDURAL BACKGROUND

1. *The parties*

Defendant Flora Rafie is Benjamin's sister and the wife of defendant Nasser Rafie. Defendant Stella Rafie is Nasser and Flora's daughter and Benjamin's niece.[2] Benjamin lived in Iran until 1985 when he migrated to the United States.

2. *The general allegations*

For purposes of review, we assume the truth of the following allegations extracted from Benjamin's complaints. (*Wells Fargo Bank, N.A. v. Superior Court* (2008) 159 Cal.App.4th 381, 385.) Benjamin alleged that each of the defendants owed him a fiduciary duty of loyalty and he had the right to rely on representations made by them; at all times each defendant was the agent, employee, or co-conspirator of the others in the following conduct: While living in Iran, Benjamin invested in real estate there (the Iranian properties). For tax purposes, Flora agreed to hold title to Benjamin's Iranian properties, and she and Nasser would hold $800,000 in cash belonging to Benjamin (the Cash Trust). After Benjamin emigrated to the United States, defendants agreed to transfer the cash to Benjamin upon his demand. In reliance on all of these representations, Benjamin put title to his Iranian properties in Flora's name.

In 1990, defendants encouraged Benjamin to purchase a six-unit residential property in Santa Monica (the Santa Monica property) with Nasser and Flora. Stella, a real estate agent who later went to law school, managed the transaction. Stella recommended that the property be held in the name of Nasser and Flora and a partnership be formed through which Benjamin would own a 50 percent interest in the property. As an inducement, Stella suggested that Benjamin live in a unit. Benjamin agreed to invest in the Santa Monica property as a partner, paying a 50 percent down payment in reliance on these representations and statements.

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[2] In the interest of clarity, we shall refer to the Rafies by their given names and intend no disrespect.

In 1994 or 1995, Nasser informed Benjamin that the partnership would apply for a loan against the Santa Monica property. To optimize the interest rate, on Stella's legal advice, Benjamin signed a lease.

Benjamin alleged he made numerous attempts between 1994 and 2004 to recoup his $800,000, his Iranian properties, and his 50 percent interest in the Santa Monica property. In 1994, he asked defendants to transfer his title to the Santa Monica property to him. After a mediation session, defendants agreed. Stella promised to put this agreement in writing, telling Benjamin to take her at her word that she would deliver a deed to him. Benjamin was then told that title would remain in Nasser's name for tax purposes, but that at some point Stella would create a partnership and transfer Benjamin's 50 percent interest upon his demand. In May 1999, defendants again agreed to provide Benjamin with an accounting and transfer title to both the Santa Monica and the Iranian properties to him. In late 2000, Benjamin asked Stella to transfer the approximately $390,000 in cash belonging to him. Stella promised she would. In January 2001, Nasser gave Benjamin $289,776.16 and admitted owing another $100,000. Discussions continued through late 2002, when Benjamin demanded to be paid. In 2001 through 2003, Nasser promised to complete the transfer of the one-half interest of the Santa Monica and Iranian properties to Benjamin, but explained that the transfers would "take a while." Finally, when Benjamin asked Stella to assist him with the transfers in 2003, she told him she was unable to convince her parents to comply with the agreement that had been reached.

That same year, Benjamin retained counsel to collect the balance of money owed him, to confirm whether title to the Santa Monica property had been transferred to him, and to assist him in ascertaining the status of his properties in Iran. Benjamin's attorney learned that the Iranian properties had been sold to third parties and defendants had never deeded him his interest in the Santa Monica property. Benjamin filed this action on March 12, 2004.

3. *Dismissal of the quiet title cause of action from the first amended complaint*

The first amended complaint alleged seven causes of action: (1) quiet title to the Santa Monica property; (2) imposition of constructive trust and accounting with respect to the Cash Trust; (3) imposition of constructive trust and accounting with respect to the Iranian properties; (4) fraud; (5) conversion; (6) money had and received; and (7) tortious interference with quiet enjoyment.

The trial court sustained defendants' demurrer to the quiet title cause of action without leave to amend, citing the statute of limitations. It granted Benjamin 20 days' leave to amend the conversion cause of action, among others, and overruled the demurrer to still other causes of action.

4. *Dismissal of the constructive trust and accounting cause of action from the second amended complaint*

The second amended complaint alleged five causes of action: (1) imposition of constructive trust and accounting with respect to the Cash Trust; (2) imposition of constructive trust and accounting with respect to the Iranian properties; (3) fraud; (4) money had and received; and (5) tortious interference with quiet enjoyment.

As for Benjamin's request for a constructive trust and accounting for the sale of the Iranian properties, defendants moved to dismiss that cause of action on the grounds of inconvenient forum. The court granted that motion. The court gave Benjamin 20 days' leave to amend the fraud cause of action.

5. *Dismissal of the fraud, declaratory relief, breach of fiduciary duty, and conversion causes of action from the third amended complaint*

The third amended complaint alleged seven causes of action. As before, Benjamin alleged: (1) imposition of constructive trust for the "liquid assets;" (2) fraud; (3) money had and received; and (4) tortious interference with quiet enjoyment. He also alleged two new causes of action: (5) breach of fiduciary duty and (6) declaratory relief. And, Benjamin amended and realleged the

(7) conversion cause of action previously contained in the first amended complaint.

Nasser and Stella demurred to the causes of action for constructive trust of the "liquid assets," declaratory relief, fraud, and breach of fiduciary duty, on the grounds they had already been dismissed. They demurred to the fraud, breach of fiduciary duty, and conversion causes of action on statute of limitations grounds. Additionally, Nasser moved to strike various portions of the third amended complaint arguing they went beyond the scope of allowed amendment. The majority of the motion was aimed at references to the Iranian properties, the allegations of which property, Nasser asserted, had been subject to the earlier dismissal for inconvenient forum. With respect to the Santa Monica property, Nasser asserted that "the court has made dispositive rulings as to the Santa Monica Property," with the result that all allegations referring to it should be stricken.

The court sustained Nasser's and Stella's demurrer without leave to amend to the fraud cause of action on the ground of insufficient facts. It sustained the demurrer without leave to amend to the declaratory relief, breach of fiduciary duty, and conversion causes of action as they were outside the scope of the previous leave to amend. The court granted Nasser's motion to strike in part. However, the court overruled the demurrer to the causes of action for constructive trust, money had and received, and tortious interference with quiet enjoyment.

6. *Summary adjudication*

After the demurrers were sustained, the only causes of action remaining in the third amended complaint were those for (1) constructive trust of the "liquid assets," (2) money had and received, and (3) tortious interference with quiet enjoyment. After answering the complaint, Nasser moved for summary adjudication of the causes of action for constructive trust and money had and received on grounds of the four-year statute of limitations for written agreements (Code Civ. Proc., § 337) and the two-year statute of limitations for oral agreements (§ 339). Nasser cited Benjamin's deposition testimony that the cash

had been given to defendants in 1980-1981, Benjamin asked for his money and received a portion in 1985 and 1987. Therefore, Nasser argued, Benjamin should have commenced this action in 1989. No payments Nasser made, he argued, revived the statute. (§ 360.) Nasser also moved to preclude certain elements of the cause of action for interference with quiet enjoyment.

The court granted summary adjudication of the constructive trust and money had and received causes of action. After sustaining objections to Benjamin's evidence of a contract, the trial court ruled that the statute of limitations had run and that Code of Civil Procedure section 360 did not apply to take the case out of the statute as there was no written contract or promissory note.

The court next found that numerous triable factual issues precluded summary adjudication of the tortious interference with quiet enjoyment cause of action. The parties then stipulated that a judgment be entered on the causes of action that the court had dismissed for purposes of expediting an appeal and dismissed the remaining causes of action and the cross-complaint without prejudice. After judgment was entered, Benjamin filed his appeal.

CONTENTIONS

Benjamin assigns as error: (A) sustaining without leave to amend the demurrer to the quiet title cause of action in the first amended complaint; (B) dismissing the constructive trust and accounting cause of action from the second amended complaint; (C) sustaining without leave to amend the demurrer to the fraud, declaratory relief, breach of fiduciary duty, and conversion causes of action in the third amended complaint; and (D) granting the motion for summary adjudication of the constructive trust and money had and received causes of action.

DISCUSSION

I. *Parties to this appeal*

Benjamin appears to concede the point made by Nasser that Benjamin did not timely appeal from the judgment against Stella. The judgment dismissing

Stella from the action was filed on July 25, 2005. Benjamin's appeal was filed October 19, 2006, more than a year later. Hence, with respect to Stella, Benjamin's appeal is untimely and so we have no jurisdiction to hear it. " 'It is settled that the rule [that an appeal may not be taken from an "interlocutory" judgment] does not apply when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party.' [Citations.]" (*Millsap v. Federal Express Corp*. (1991) 227 Cal.App.3d 425, 430, fn. omitted.) The appeal concerning Stella is dismissed.

By contrast, Benjamin's appeal from the judgment dismissing Flora is timely. Benjamin argues that his appeal from the judgment of August 21, 2006, encompassed the causes of action in the third amended complaint alleged against Flora, with the result that his notice of appeal filed on October 19, 2006, against her was timely. The "Judgment of Dismissal as to Defendant *Flora Rafie*" was filed on July 28, 2006, and was served on Benjamin. But the July 28, 2006, document is not entitled "notice of entry of judgment" and there is no proof of service attached. (Cal. Rules of Court, rule 8.104(a)(2).)

Respondents counter while Benjamin's notice of appeal listed the January 19, 2006 ruling sustaining Flora's demurrer to the third amended complaint, that his notice does not make specific reference to the separate judgment dismissing Flora from the action and we may not construe the notice so liberally as to include a separately appealable order. (See *Sole Energy Co. v. Petrominerals Corp*. (2005) 128 Cal.App.4th 212, 239.) But, no construction is necessary, let alone a liberal one, of Benjamin's notice of appeal. As respondents observe, Benjamin's notice of appeal specifically listed the trial court's order of January 19, 2006 that granted Flora's, and only Flora's, demurrer to the third amended complaint. Therefore, Benjamin's appeal filed on October 19, 2006, was timely with respect to Flora. (Cal. Rules of Court, rule 8.104(a)(2).)

II. *The demurrers and motion to strike*

a. *Standard of review*

"In reviewing a demurrer that is sustained without leave to amend, an appellate court assumes the truth of (1) all facts properly pled by the plaintiff, (2) all facts contained in exhibits to the complaint, (3) all facts that are properly the subject of judicial notice, and (4) all facts that reasonably may be inferred from the foregoing facts. [Citations.]" (*Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1305, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"The reviewing court must reverse the judgment if (1) the complaint, liberally construed, has stated a cause of action under any possible legal theory; or (2) the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citations.] The burden of proving a reasonable possibility of cure is squarely on the plaintiff. [Citation.]" (*Neilson v. City of California City, supra,* 133 Cal.App.4th at p. 1305.)

b. *The trial court erred in sustaining the demurrer to the quiet title cause of action in the first amended complaint.*

Benjamin alleged that he paid Nasser $108,000 as his half of the down payment for the purchase of the Santa Monica property. Nasser took legal title to the property in his name. Benjamin moved into a unit in that property in August 1992. In exchange for his contribution to the down payment, Benjamin alleged, Nasser promised to deliver a deed to Benjamin conveying an undivided one-half interest in the property upon Benjamin's request. Nasser has not tendered the deed. Benjamin alleged that both Nasser and Stella made repeated promises between 1990 and 1994, that Nasser would deliver a deed to Benjamin, but they never did. He also alleged that "on many occasions, up to and including the year 2004," Benjamin demanded the promised quitclaim deed and that both Nasser and Stella have promised to deliver the deed.

To state a cause of action to quiet title, the complaint must include a description of the property that is the subject of the action; the basis for plaintiff's

title; the adverse claims to plaintiff's title; the date as of which the determination is sought; and a prayer for the determination of the title of the plaintiff against the adverse claims. (Code Civ. Proc., § 761.020.)[3] Benjamin alleged the property description both by street address and legal description (§ 761.020, subd. (a)); that he claimed to own a 50 percent legal interest in the property based on his agreement with Nasser and his payment to Nasser of half of the down payment (§ 761.020, subd. (b)); the fact that legal title is vested in Nasser who claims exclusive ownership (§ 761.020, subd. (c)); and a prayer for the determination of 50 percent legal title in Benjamin as of the date the complaint was filed (§ 761.020, subds. (d) & (e).) Benjamin stated a cause of action.

As noted, the trial court sustained defendants' demurrer without leave to amend on the ground of the five-year statute of limitations (Code Civ. Proc., § 319). The parties disagree about whether the three-year statute of limitations for actions based on fraud, contained in section 338, subdivision (d)[4] or the five-year period related to actions involving title contained in section 319 would apply in

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[3] Code of Civil Procedure section 761.020 reads, "The complaint shall be verified and shall include all of the following: [¶] (a) A description of the property that is the subject of the action. In the case of tangible personal property, the description shall include its usual location. In the case of real property, the description shall include both its legal description and its street address or common designation, if any. [¶] (b) The title of the plaintiff as to which a determination under this chapter is sought and the basis of the title. If the title is based upon adverse possession, the complaint shall allege the specific facts constituting the adverse possession. [¶] (c) The adverse claims to the title of the plaintiff against which a determination is sought. [¶] (d) The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint shall include a statement of the reasons why a determination as of that date is sought. [¶] (e) A prayer for the determination of the title of the plaintiff against the adverse claims."

[4] Code of Civil Procedure section 338, subdivision (d) reads, "An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

this case. We conclude, quite apart from which statute of limitations would apply, that Benjamin alleged facts, which if proven, would estop Nasser from raising the statute as a defense. Benjamin alleged "estoppel activities," i.e., promises made by Nasser, and by Stella on Nasser's behalf, that they would convey to Benjamin his one-half interest, to justify application of estoppel against the statute.

"An estoppel against a limitations defense usually ' "arises as a result of some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action." ' [Citations.]" (*Spray, Gould & Bowers v. Associated Internat. Ins. Co*. (1999) 71 Cal.App.4th 1260, 1267-1268.) For estoppel to apply in this context, "[i]t is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.] '[W]hether an estoppel exists -- whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice -- *is a question of fact and not of law*. [Citations.]" (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43.)

The elements of equitable estoppel are: " ' "(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury." ' [Citation.] [¶] Application of equitable estoppel against the assertion of a limitations defense typically arises through some misleading affirmative conduct on the part of a defendant." (*Spray, Gould & Bowers v. Associated Internat. Ins. Co., supra*, 71 Cal.App.4th at p. 1268.)

One situation in which estoppel has been applied is "where the defendant makes representations to the effect that he will *perform his contractual obligation,* and the plaintiff, in reliance thereon, forbears to sue in time. [Citations.]"

(3 Witkin, Cal. Procedure (4th ed. 1997) Actions, § 686, pp. 873-874.) For example, in *Shaffer v. Debbas, supra*, 17 Cal.App.4th 33, the plaintiffs contracted with the defendants to build a house, which the defendants warranted would be free from defects for a year. After the plaintiffs moved into the house, they began experiencing numerous problems caused by construction defects. Despite the defendants' repeated promises to correct them, the problems were never fixed. The plaintiffs' lawsuit to recover damages was filed more than a year later. (*Id*. at pp. 38-39.)

Shaffer held that the plaintiffs' emotional distress claims were not barred by the one-year statute of limitations because the defendants were estopped to assert that defense. The defendants had made repeated promises that the defects would be fixed, and the jury had found that the defendants had induced the plaintiffs to delay filing their emotional distress claims. (*Shaffer v. Debbas, supra*, 17 Cal.App.4th at pp. 42-43.) In reaching this conclusion, the *Shaffer* court stated, "Where the plaintiffs reasonably rely on defendants' promise to repair the property damage without a lawsuit, is a jury permitted to find that plaintiffs' decision to delay filing a personal injury lawsuit was also reasonable? We conclude such a finding is permissible on the facts of this case." (*Id.* at p. 43.)

Here, Benjamin alleged numerous "Estoppel Activities," engaged in by Nasser and Stella, designed to lull Benjamin into forbearing from suit. In particular, Benjamin alleged that Stella was an active real estate sales person. She and Nasser promised Benjamin that they would prepare a quitclaim deed for one-half of the legal title to the Santa Monica property in favor of Benjamin. He alleged numerous instances in which defendants promised to transfer Benjamin's assets to him. Benjamin asked Stella to memorialize their agreements. Stella responded that Benjamin "should take her word on her promises" concerning the Santa Monica property because "she [was] becoming an attorney." These allegations meet the four elements listed above. Benjamin alleged Nasser induced Benjamin to give him money to purchase the Santa Monica property on the

promise that Benjamin would be a 50 percent holder of legal title; that defendants intended that Benjamin act on their promises while Benjamin was ignorant of the fact they never intended to transfer title to him. Benjamin, in fact, did rely on these representations by handing over his money to Nasser, moving into a unit. Furthermore, one necessary element of estoppel "is justifiable ignorance of the true facts by the party claiming estoppel." (*Kiernan v. Union Bank* (1976) 55 Cal.App.3d 111, 117.) Benjamin's complaint alleged not only that Stella was becoming an attorney and told Benjamin to "take her word on her promises," but defendants repeatedly admitted their obligations and that they would make good on their promises. These allegations are sufficient to meet the requirements of equitable estoppel -- and so defendants are estopped to assert a statute of limitations.

Paragraph 14 of the first cause of action in the first amended complaint alleges Benjamin demanded that Nasser deed his half-interest in the Santa Monica property as late as 2004. Furthermore, Benjamin alleged in the fraud cause of action in the first amended complaint that "within three (3) years from the date of filing the original complaint" that Nasser "falsely promised to intermediaries," that Benjamin's "assets, as previously described herein, would be returned to Plaintiff." In short, not only did Benjamin allege estoppel activities that occurred the same year he filed the complaint, but he demonstrated by the allegations of the fraud cause of action in the first amended complaint that he could allege such activities occurring within three years of the complaint. In short, he has alleged facts, which if proved, would make his first cause of action for quiet title timely.

Defendants contend summarily that "At most, Benjamin's complaint articulated only that he may have had some *equitable* interest in the Santa Monica property" and that " '[i]t has been held consistently that the owner of an equitable interest cannot maintain an action to quiet title against the owner of the legal title.' " However, "[w]hile it is generally true that an action to quiet title cannot be maintained by the holder of an equitable title against the holder of legal title,

where the holder of legal title is a fiduciary who has fraudulently obtained title from a defrauded buyer, the defrauded buyer may maintain an action." (12 Miller & Starr, Cal. Real Estate (2007 supp.) Remedies, § 34:105, p. 31, citing *Warren v. Merrill* (2006) 143 Cal.App.4th 96.) Benjamin alleged the requisite fiduciary relationship. The trial court abused its discretion in sustaining the demurrer to the quiet title cause of action.[5]

c. *The trial court erred in granting the motion to dismiss the constructive trust and accounting cause of action from the second amended complaint on the ground of forum non conveniens.*

In his second amended complaint, Benjamin sought a constructive trust over and accounting of "the cash proceeds" from the purported sale of properties he claimed he owned in Iran. Nasser moved to dismiss this cause of action on the ground of inconvenient forum. Nasser asserted that this claim involved the sale of realty in Iran and "all records would be in Farsi, most percipient witnesses relating to the transactions would be in Iran, the court may well be obliged to apply the law of Iran to transactions [there], and any order rendered [would] be unenforceable in Iran." In his declaration attached to the motion, Nasser denied he sold property in Iran or received any money. Nasser noted that there was a functioning court system in Iran that Benjamin "could use to assert any rights" concerning property

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[5] We decline the invitation to announce a rule stating that while a party may be estopped to raise the statute of limitations, the estoppel cannot continue for a 10 year period. " '[A] party has a reasonable time in which to bring his action after the estoppel has expired, not exceeding the period of limitation imposed by the statute for commencing the action . . . .' [Citation.]" (*County of Santa Clara v. Vargas* (1977) 71 Cal.App.3d 510, 524.) Here, Benjamin alleged estoppel activities that continued to 2004 or at least within three years of 2004. As we have noted, whether estoppel lies is a question for the trier of fact. (*Shaffer v. Debbas, supra*, 17 Cal.App.4th at p. 43.) We do not determine as a matter of law that Nasser is estopped from asserting the statute of limitations as a defense. We hold only that the facts as pleaded by Benjamin are sufficient to state such an estoppel and the commencement of this lawsuit within three years of when the estoppel activities expired.

in that country. Nasser attached a declaration from his attorney stating that he had requested discovery relating to the Iranian properties and had not received a formal response other than an indication that the records were being sought. The trial court granted Nasser's motion to dismiss on the ground of forum non conveniens.

"When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." (Code Civ. Proc., § 410.30, subd. (a).)

A ruling on a motion to dismiss for an inconvenient forum is both nondiscretionary and discretionary. (*American Cemwood Corp. v. American Home Assurance Co*. (2001) 87 Cal.App.4th 431, 436.) "[T]he analysis is twofold. 'In determining whether to grant a motion based on forum non conveniens, the court first must make a threshold determination whether the alternate forum is a suitable place for trial. [Citations.] *This is a nondiscretionary determination.* [Citation.]' [Citations.] Only if it finds the alternative forum suitable does the court proceed to the discretionary exercise of balancing the private interests of the litigants and the interests of the public in retaining the action in California. [Citation.] In assessing suitability, however, 'There is no balancing of interests in this decision, nor any discretion to be exercised.' [Citation.] We therefore review the legal question before us de novo." (*Ibid.*, fn. omitted.)

"[A] forum is suitable if the defendant is amenable to process there, there is no procedural bar to the ability of courts of the foreign jurisdiction to reach the issues raised on their merits (or, if there is, the advantage of the bar -- typically, the statute of limitations -- is waived by defendants), and adjudication in the alternative forum is by an independent judiciary applying what American courts regard, generally, as due process of law. The fact that a plaintiff will be disadvantaged by the law of that jurisdiction, or that the plaintiff will probably or

even certainly lose, does not render the forum 'unsuitable' in this analysis." (*Boaz v. Boyle & Co.* (1995) 40 Cal.App.4th 700, 711.)

"[T]he moving party bears the burden of proving that California is an inconvenient forum. [Citation.] There thus must be *evidence* -- not merely bald assertions -- to support the trial court's determination. [Citation.]" (*Ford Motor Co. v. Insurance Co. of North America* (1995) 35 Cal.App.4th 604, 610, citing *Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751-752.)

Nasser, who bore the burden to demonstrate that Los Angeles County was an inconvenient forum, made no showing that Iran provided a *suitable* forum under the nondiscretionary prong of the analysis. Rather than to provide evidence, he merely asserted that Iran has "a republican form of government, complete with three branches of government, including a judiciary," and that there was a "functioning court" there. But Nasser made no representation that he is ever present in Iran and amenable to process there. Nor did he provide *evidence* that Iranian law (1) provides some form of due process of law, (2) may reach the merits of Benjamin's claims, or (3) provides a remedy for Benjamin's cause of action. In short, Nasser's motion failed to address the threshold issue. The trial court had *no evidence* upon which to make its nondiscretionary determination about suitability. (*Ford Motor Co. v. Insurance Co. of North America, supra,* 35 Cal.App.4th at p. 610.) Although certain documents pertinent to resolution of this case would be located in Iran and written in Farsi, the trial court should never have considered these factors, as it had no evidence of the threshold issue of the suitability of an Iranian forum.

In reaching our conclusion, we note that Benjamin's complaint seeks a constructive trust over and accounting of "the cash *proceeds* from the sale of the Iranian Properties." (Italics added.) Nasser did not assert that the money at issue is in Iran. Both he and Benjamin are present in Los Angeles County. The trial court in California can certainly impose a constructive trust over dollars located here. Also, as the result of our holding, the parties will already be engaged in

litigation here. It would be a waste of resources and onerous to conduct two lawsuits on opposites sides of the globe. The trial court erred in granting Nasser's motion to dismiss the cause of action for a constructive trust and accounting in the sale of the Iranian properties on this ground.[6]

d. *The trial court erred in sustaining the demurrer to the fraud cause of action in the third amended complaint.*

"The well-established common law elements of fraud which give rise to the tort action for deceit are: (1) misrepresentation of a material fact (consisting of false representation, concealment or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to deceive and induce reliance; (4) justifiable reliance on the misrepresentation; and (5) resulting damage. [Citations.] It is not essential to liability for fraud that the person charged have received any advantage from the fraud. Thus, a person may be liable for fraudulent misrepresentations even if he or she gains no benefit or profit of any kind from them. [Citations.] It is essential, however, that the person complaining of fraud actually have relied on the alleged fraud, and suffered damages as a result. [Citations.] What distinguishes actionable fraudulent deceit is the element of knowing intent to induce someone's action to his or her detriment with false representations of fact. Fraud is an intentional tort . . . . It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other. [Citations.]" (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 481-482, fn. omitted.) "Fraud is required to be pleaded with specificity." (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 362.)

The trial court here sustained Nasser's demurrer to the fraud cause of action for failure to state a claim.

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[6] As the result of our conclusion here, we need not reach Benjamin's further contention that the court erred in failing to grant him a continuance to oppose the motion and in denying his motion for reconsideration.

The allegations in the third amended complaint are: between 1994 and 2003, Nasser and Flora agreed (1) to hold title to Benjamin's real properties and manage them, and (2) to hold his money. Nasser and Flora represented that they would return the Iranian properties and cash to him upon his demand. Benjamin further alleged that in 1990, each defendant told him that Stella, a real estate agent, had located income-producing property in Santa Monica and encouraged Benjamin to purchase it with defendants. They represented that for tax and convenience reasons, legal title to the Santa Monica property should be held in Nasser's and Flora's names and a partnership would be formed through which Benjamin would own a 50 percent interest in the title. Defendants promised that 50 percent of the title in the Santa Monica property or the partnership would be transferred to Benjamin upon his demand. Additionally, in 1994 or 1995, Nasser and Stella recommended that Benjamin sign a lease to his apartment in Santa Monica to enable them to obtain a better refinancing interest rate. Each defendant represented that signing the lease would not prejudice Benjamin's interest because he was part owner. Finally, each defendant repeatedly orally promised to protect Benjamin's interest in the Santa Monica property, the Cash Trust, and the Iranian properties.

Benjamin relied on these representations, he alleged, by paying 50 percent of the down payment for the Santa Monica property, placing title to his Iranian properties in Flora's name, and signing the lease.

In fact, Benjamin alleged, these representations were false in that defendants never intended to transfer title, and have stalled in response to Benjamin's repeated demands that title to the Iranian properties, 50 percent interest in the Santa Monica property, and the remaining money in the Cash Trust be re-transferred to him.[7] Defendants knew the representations were false and

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[7] Nasser paid Benjamin $289,776 in January 2001, but has not paid the balance of the money allegedly belonging to Benjamin.

made them to induce Benjamin to act as alleged above. Benjamin was ignorant of the representations' falsity.

In 2003, Benjamin alleged, he discovered through his attorney that defendants had sold the Iranian properties to third parties and title to the Santa Monica property had never been transferred to him.

The allegations of the third amended complaint are sufficiently definite and substantive to state a cause of action against Nasser and Flora for fraud based on these above-described allegations and the general allegations that each defendant is an agent and co-conspirator of the other.

We disagree with defendants that this fraud cause of action was time barred by the three-year statute of limitations of Code of Civil Procedure section 338, subdivision (d). "The discovery rule 'postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.' [Citations.] [¶] . . . By statute, the discovery rule applies to fraud actions. (Code Civ. Proc., § 338, subd. (d).) In addition, 'judicial decisions have declared the discovery rule applicable in situations where the plaintiff is unable to see or appreciate a breach has occurred.' [Citation.] 'Delayed accrual of a cause of action is viewed as particularly appropriate where the relationship between the parties is one of special trust such as that involving a fiduciary, confidential or privileged relationship." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1318 (*E-Fab*).)

"Thus, in actions where the rule applies, the limitations period does not accrue until the aggrieved party has notice of the facts constituting the injury. [Citation.]" (*E-Fab, supra*, 153 Cal.App.4th at p. 1318.) "For purposes of accrual of the limitations period, inquiry notice is triggered by suspicion. . . . 'Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights.' [Citation.] . . . 'under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff *has reason to suspect an injury and some wrongful*

cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for *that particular cause of action.*' [Citation.]" (*Id.* at p. 1319.)

" 'A plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery *and* (2) the inability to have made earlier discovery despite reasonable diligence. The burden is on the plaintiff to show diligence, and conclusory allegations will not withstand demurrer.' [Citations.]" (*E-Fab, supra*, 153 Cal.App.4th at p. 1319.)

" '[O]nce properly pleaded, belated discovery is a question of fact.' [Citation.] As our state's high court has observed: 'There are no hard and fast rules for determining what facts or circumstances will compel inquiry by the injured party and render him chargeable with knowledge. [Citation.] It is a question for the trier of fact.' [Citation.] 'However, whenever reasonable minds can draw only one conclusion from the evidence, the question becomes one of law.' [Citation.] Thus, when an appeal is taken from a judgment of dismissal following the sustention of a demurrer, 'the issue is whether the trial court could determine as a matter of law that failure to discover was due to failure to investigate or to act[ing] without diligence.' [Citation.]" (*E-Fab, supra*, 153 Cal.App.4th at p. 1320.)

Here, Benjamin alleged his inability to have made earlier discovery despite reasonable diligence. (*E-Fab, supra*, 153 Cal.App.4th at p. 1319.) He alleged defendants' repeated acknowledgment that they owed him money and property, and their repeated promises and assurances that they would transfer his assets to him soon, or that it would take time. Meanwhile, defendants suggested Benjamin move into the Santa Monica property and later that he lease a unit. He alleged a meeting in 1994 during which defendants promised to transfer title to Benjamin but to keep it in Nasser's name for tax purposes. Again, in 1999 and 2000, when Benjamin requested return of his assets, Stella promised to represent him and

protect his interests and Nasser paid Benjamin some cash in early 2001. The complaint also alleged a special trust relationship between him and Nasser and Flora, as fiduciaries, because Nasser and Flora were not only family, but also partners with Benjamin in the Santa Monica deal. Defendants' promises led to his delayed discovery of the true facts.

Also, Benjamin adequately alleged the time and manner of discovery. (*E-Fab, supra*, 153 Cal.App.4th at p. 1319.) His complaint alleged that, in 2003, Stella first acknowledged that her parents would not comply with their promises to transfer Benjamin's assets to him and she filed an unlawful detainer action. That same year, he hired an attorney to collect the balance of the money owed to him and to assist in ascertaining the status of his properties in Iran and Santa Monica and discovered the true state of affairs. Benjamin filed his lawsuit the following year, i.e., within the three years of 2003 as set forth in Code of Civil Procedure section 338, subdivision (d).

In our view, Benjamin properly pled belated discovery. Whether his conduct was reasonable is a factual one, not to be made at this stage of the litigation. (*E-Fab*, *supra*, 153 Cal.App.4th at p. 1320.) Nor do we think that only one conclusion can be drawn from the allegations so as to make the question of Benjamin's reasonable belated discovery one of law. (*Ibid*.) The demurrer to this cause of action was brought on the ground of the statute of limitations, among other things. The court sustained the demurrer on a different ground, leading to the conclusion that the trial court could not say as a matter of law that Benjamin's failure to discover was because he failed to investigate or to act with diligence. (*Ibid.*) The trial court erred in sustaining the demurrer to this cause of action on that ground.

Defendants contend that the allegations concerning Benjamin's Iranian properties were not properly pled because the trial court had already dismissed those allegations for lack of convenient forum. With respect to the Santa Monica property, defendants cite the trial court's ruling sustaining their demurrer to the

quiet title cause of action, contending that as a result, "Benjamin's *claim* regarding the Santa Monica property was barred by the statute of limitations." (Italics added.) Apart from whether that is so, as the result of our disposition reversing those rulings, the allegations concerning the Iranian and Santa Monica properties remain alleged in the complaint.

The court erred in dismissing the fraud cause of action.[8]

e. *The trial court did not err in sustaining the demurrers to the declaratory relief, breach of fiduciary duty, and conversion causes of action in the third amended complaint.*

Benjamin contends that the trial court erred in sustaining the demurrer to the second cause of action for declaratory relief against Nasser, the sixth cause of action alleging breach of fiduciary duty against all defendants, and the seventh cause of action for conversion against all defendants in the third amended complaint. Defendants had argued that these causes of action were nothing more than "restatements of the causes of action which the trial court previously had dismissed" when it sustained without leave to amend the cause of action to quiet title and dismissed the constructive trust and accounting cause of action concerning the Iranian properties.[9] The trial court sustained the demurrers to these

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[8] As the result of our conclusion here, we need not address the subsequent issue of whether the trial court properly denied Benjamin's motion to reconsider its ruling sustaining the demurrer to Benjamin's fraud cause of action.

[9] Defendants cite the rule that California applies the primary rights theory, under which "the violation of a single primary right gives rise to but a single cause of action." But, for purposes of reviewing the trial court's ruling sustaining the demurrer here, this contention is unpersuasive. "The rule against splitting a cause of action is . . . in part a rule of *abatement* and in part a rule of *res judicata*." (*Hamilton v. Asbestos Corp., Ltd*. (2000) 22 Cal.4th 1127, 1145-1146.) As our Supreme Court explained, " 'The primary right theory has a fairly narrow field of application. It is invoked most often when a plaintiff attempts to divide a primary right and enforce it in *two suits*.' " (*Ibid.*, italics added.) A plaintiff may not split a single cause of action and make it the basis of several *suits*. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 35, p. 95.) But a plaintiff may *plead* a

three new causes of action in the last iteration of the complaint on the ground that they exceeded the scope of the court's prior leave to amend. This was not error.

Although courts in California "have 'a policy of great liberality in allowing amendments at any stage of the proceeding' " (*Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163), once a defendant's demurrer is heard, the plaintiff loses the "unfettered right to file an amended complaint. '[A] litigant does not have a positive right to amend his pleading after a demurrer thereto has been sustained. "His leave to amend afterward is always of grace, not of right. [Citation.]" [Citation.]' [Citation.]" (*Leader v. Health Industries of America, Inc*. (2001) 89 Cal.App.4th 603, 612-613, citing Code Civ. Proc., §§ 472, 473.) After expiration of the time in which a pleading can be amended as a matter of course, the pleading can only be amended by obtaining the permission of the court. (*Ibid.*)

It is likewise true that a court has "authority to strike pleadings 'not filed in conformity with its prior ruling.' [Citation.] Under [Code of Civil Procedure] section 436: 'The court may, upon a motion made pursuant to Section 435 [allowing motions to strike], *or at any time in its discretion*, and upon terms it deems proper: [¶] . . . [¶] (b) Strike out all . . . of any pleading not drawn or filed in conformity with . . . an order of the court.' (Italics added.) Indeed, 'by virtue of its *inherent* power to prevent abuse of its processes' (italics added), a trial court may strike an amended complaint 'filed in disregard of established procedural processes,' and may strike an amended pleading 'because no request for permission to amend was sought.' [Citation.]" (*Leader v. Health Industries of America, Inc*., *supra*, 89 Cal.App.4th at p. 613.)

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number of legal *theories* in a single complaint (4 Witkin, *supra*, at §§ 39 & 363, pp. 99, 466-467), even though he or she is only entitled a single *recovery* for each distinct item of compensable damage *proven*. (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158.)

We review the trial court's decisions to strike a pleading under section 436 for abuse of discretion. Benjamin bears the burden to establish such abuse. (*Leader v. Health Industries of America, Inc.*, *supra*, 89 Cal.App.4th at p. 612.)

With respect to the conversion cause of action, Benjamin alleged it in the first amended complaint. After sustaining the demurrer to that cause of action, the trial court gave Benjamin 20 days' leave to amend it. Rather than to plead an amended version of that cause of action, Benjamin omitted the claim entirely from his second amended complaint. When he reinserted the cause of action into the third amended complaint, he did so long after the 20-days' leave had expired. Hence, Benjamin included his conversion allegations without court permission. The trial court had the authority to strike the conversion cause of action from the third amended complaint.

Likewise, with respect to the causes of action for declaratory relief and breach of fiduciary duty, Benjamin added them in the third amended complaint. These causes of action had not been alleged before and so they were entirely new. But, by the third amended complaint, his right to amend as a matter of course had expired. There is nothing in the record to indicate that Benjamin applied for or received permission to add new causes of action. The trial court therefore did not abuse its discretion in dismissing the declaratory relief and breach of fiduciary duty causes of action.

III. *Summary adjudication*

a. *Standard of review*

Summary adjudication is granted when a moving party establishes the absence of a triable issue of material fact and the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) " ' " 'We review the [superior] court's decision to grant . . . summary judgment de novo.' [Citation.]" [Citation.]' [Citation.]" (*Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1162.)

In moving for summary adjudication, a "defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2); see also, *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) Once the moving party defendant meets its burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists. (§ 437c, subd. (p)(2).) To meet that burden, the plaintiff " ' "shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." ' [Citations.] Where the plaintiff fails to satisfy this burden, judgment in favor of the defendant shall be granted as a matter of law. [Citation.]" (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014.) "On appeal, this court examines the facts and independently determines their effect as a matter of law. [Citations.]" (*Salazar v. Southern Cal. Gas Co*. (1997) 54 Cal.App.4th 1370, 1376.)

b. *The trial court erred in granting summary adjudication of the causes of action for imposition of constructive trust over the Cash Trust and on common count for money had and received.*

After answering the complaint, Nasser moved for summary adjudication of the causes of action for constructive trust of the "liquid assets" and money had and received alleged against him alone.[10] As grounds, he raised the bars of the two-year statute of limitations contained in Code of Civil Procedure section 339 for oral obligations and the four-year statute for written agreements in section 337. Nasser asserted, based on Benjamin's deposition testimony, that there existed no documents reflecting defendants' receipt of cash from Benjamin. Nasser also

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[10] As noted, Nasser also moved for summary adjudication of the tortious interference with quiet enjoyment cause of action. The court denied that portion of the motion and Benjamin dismissed it without prejudice pursuant to stipulation. Thus, we do not address this portion of the court's ruling.

suggested that Benjamin last demanded the return of his money in 1985 and 1987, by citing the question put to Benjamin in his deposition: "[s]o between '85 and 1987, how many times did you ask [for a refund]?" Hence, Nasser argued, the statute of limitations ran as of 1989.

In his opposition, Benjamin submitted his declaration attesting that he "repeatedly and continually" asked Nasser for his money between 1985 and late 2003. Benjamin also demonstrated, by citing his own deposition testimony, that Nasser made a payment to Benjamin in January 2001. Finally, Benjamin asserted as his undisputed fact number 20, that the "last payment was made to Plaintiff in or about 2004." In support of this fact, Benjamin submitted Nasser's testimony from page 62 of his deposition in which Nasser stated that the last payment was made "[a] year and a half or two years" before the June 2006 deposition, or either two months before or three months after Benjamin filed his complaint. There is no suggestion in the record that Nasser disputed fact No. 20.[11]

The statute of limitations for breach of an oral contract and for money had and received is two years (Code Civ. Proc., § 339, subd. 1); and for breach of obligations founded on a written instrument is four years (Code Civ. Proc., § 337, subd. 1). " ' "[T]he criterion for determining the particular statute of limitations applicable, is not the form of the action, but the substance of it and the nature of the right, the violation of which creates the right of action." ' [Citations.]" (*Creditors Collection Service v. Castaldi* (1995) 38 Cal.App.4th 1039, 1043.) Regardless of which statute applies, the trial court erred in granting summary adjudication of these two causes of action.

The substance and nature of the right for which Benjamin seeks redress is manifestly the breach of an agreement between Nasser and Flora on the one hand, and him on the other hand. Benjamin alleged Nasser and Flora "agreed to hold cash," defined as the $800,000 Cash Trust, and that Nasser and Flora promised to

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[11] Because he did not argue in a separate statement that his page 62 deposition testimony refers to a different debt, Nasser cannot be heard to argue this now.

return the entire Cash Trust upon Benjamin's demand. The court based its ruling on the "undisputed facts" that Benjamin "asked defendant for the return of his money 'many times' from 1985 to 1987 and again from 1992 to 1993 . . . . Plaintiff did not file this action until March 12, 2004, long after any of the possible statutes of limitations had run."

As set forth as facts numbers one and two, in Nasser's own separate statement of undisputed facts, which Benjamin did not dispute, Benjamin gave the money to Nasser between 1981 and 1984. Benjamin demanded Nasser return this money many times between 1985 and 1987. We note the self-limiting aspect of Nasser's question to Benjamin, "between 1985 and 1987, how many times did you ask [for a refund]?" This question specifically did not address the number of times *after* 1987 Benjamin made a demand and is not evidence that Benjamin made no demands for a refund after 1987, with the result Nasser did not carry his burden in moving for summary adjudication to show that Benjamin made no demand for a refund after 1987.

Furthermore, in opposing summary adjudication, Benjamin produced evidence that Benjamin made "frequent requests" to Nasser between 1992 and 1993 to "release his cash assets" and that Nasser made payments in 2001, and somewhere around six months before Benjamin filed his complaint. And, as noted, Nasser did not dispute that he made a payment on this debt to Benjamin in 2004.[12]

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[12] We disagree with Benjamin that the trial court should have applied the four year statute of limitations for breach of a written contract. He cited to Nasser's deposition testimony acknowledging a handwriting. Yet, apart from the fact that the writing Benjamin relied on is not signed by Nasser, the party Benjamin seeks to charge (cf. Code Civ. Proc., § 360 [writing must be signed by party to be charged to evince a promise of new or continuing contract]), Nasser testified that the document Benjamin cited, written in Farsi, was an accounting of an entirely different debt, one *Angela* owed Benjamin commencing in 1992. The money Angela "borrowed from [Benjamin's] account" in 1992, Nasser further testified, was "paid to [Benjamin]." The testimony that Benjamin relied on does not

Observing that *Nasser made promises* to pay back the debt as late as 2003, the year before this lawsuit was commenced, and that Nasser actually paid him some money in 2004, Benjamin argues that "a continuing promise to pay a debt extends the statute of limitation." As authority for this proposition, Benjamin cites generally to 3 Witkin, California Procedure (4th ed. 1996) Actions, section 487, at page 613. There, Witkin begins his discussion by reciting the "general rule" that "[t]he cause of action for breach of contract ordinarily accrues at the time of *breach*." (*Id*. at § 486, p. 611.) Strictly applied, Witkin explains, the general rule "may bar the action before the plaintiff has suffered any substantial injury and hence before it is worth his while to sue." (*Id*. at p. 612.) To avoid the harsh effect of the general rule, an exception has developed in which the promise is treated as a continuing covenant. (*Ibid.*)

Nasser argues that the examples Witkin cites are inapplicable. Witkin's examples involve the obligation to make monthly deliveries or payments (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co*. (2004) 116 Cal.App.4th 1375, 1396), or the obligation of a city to levy a tax under an improvement bond act (*McGrath v. Butte County* (1939) 30 Cal.App.2d 734, 736). In *Armstrong*, the agreement was made up of several contracts. (*Armstrong, supra,* at p. 1387.) In *McGrath*, the obligation was an ongoing one. (*McGrath, supra,* at p. 739.) We see no reason not to construe the agreement at issue here as a continuing promise on the part of Nasser and Flora to repay Benjamin the money he transferred to them when he was in Iran, with the result that Benjamin's complaint attacking the failure to pay must be brought within two years of the last payment. The undisputed facts show that the parties agreed that Nasser and Flora would repay Benjamin *on his demand*. But eventually, the parties orally modified the agreement, either implicitly or explicitly, to restore the money to Benjamin over

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address the debt created in Iran in the 1980's. Therefore, Benjamin has pointed to no writing memorializing the debt that makes up the Cash Trust, with the result that the four year statute for written contracts does not apply here.

time as Nasser was able. This was the parties' modified agreement until 2004, long past the date on which the obligation to repay the loan would have been extinguished by operation of law had the agreement not been modified. To construe the parties' agreement otherwise, would be in effect, to make a gift to defendants of all payments outstanding after 1995. Thus, it is entirely appropriate to construe this agreement as a continuing covenant to pay. Our conclusion is all the more logical here where the undisputed facts show Nasser has recognized his debt to Benjamin repeatedly over the years, and has never argued his payments to Benjamin in the last decade were a gift. As Benjamin demonstrated a triable issue of fact about whether Nasser's most recent payment occurred within two years of the March 2004 complaint, summary adjudication of the causes of action for constructive trust over the Cash Trust and on common count for money had and received should not have been granted.[13]

IV. *Summary*

In sum, Benjamin's appeal was not timely as to Stella. The trial court erred in dismissing the quiet title cause of action because Benjamin stated a cause of action and sufficiently pled equitable estoppel as a bar to asserting the statute of limitations. Because Nasser failed to carry his burden in his motion to dismiss for forum non conveniens, the trial court erred in granting it. The trial court erred in

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[13] In their petition for rehearing, defendants argue that we improperly decided this issue on a ground not raised by the parties in the trial court with the result that defendants were not provided the opportunity to brief the issue. Government Code section 68081 reads in pertinent part: "Before . . . a court of appeal . . . renders a decision in a proceeding . . . based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party." Apart from the fact that Benjamin raised this ground of a continuing covenant both in the trial court in opposition to the summary adjudication motion and on appeal, we also granted defendants' petition for rehearing (*ibid.*) wherein defendants have had the opportunity to brief the issue. No due process was denied.

dismissing the fraud cause of action because it was well pled, as was Benjamin's delayed discovery. Furthermore, the trial court did not properly dismiss the allegations concerning the Iranian and Santa Monica properties, and so the allegations concerning those properties remain part of this cause of action. The trial court erred in granting summary adjudication of the causes of action for constructive trust and on common count for money had and received. The oral agreement between the parties justifies construing it as a continuing covenant to repay Benjamin and he demonstrated a dispute of fact about whether Nasser had repaid some of the debt within two years of when the statute of limitations ran.

However, we conclude that the trial court did not err in dismissing the causes of action for declaratory relief, breach of fiduciary duty, and conversion. Benjamin added them to the third amended complaint without first seeking permission.

Nasser has moved this court to impose sanctions against Benjamin and his counsel for filing a frivolous appeal. Benjamin opposed the motion and moved for sanctions against defendants. (Cal. Rules of Court, rule 8.276(a); *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) The motions are denied.

DISPOSITION

The judgment is affirmed in part and reversed in part. The orders dismissing the quiet title and fraud causes of action are reversed. The order granting the motion to dismiss for forum non conveniens is reversed. The order granting summary adjudication of the causes of action for constructive trust and on common count for money had and received is reversed. The trial court is directed to reinstate the above-listed causes of action. In all other respects the judgment is affirmed. The appeal as to Stella Rafie is dismissed as untimely filed. Appellant

is to recover costs of appeal as against Nasser and Flora Rafie. (Cal. Rules of Court, rule 8.278(a)(3) & (5).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.